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11 Attorneys for Defendant Younique, LLC

12 UNITED STATES DISTRICT COURT
13
14 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

15 MEGAN SCHMITT, DEANA
16 REILLY, CAROL ORLOWSKY, and
STEPHANIE MILLER BRUN,
17 individually and on behalf of
themselves and all others similarly
18 situated,

19 Plaintiffs,

20 v.

21 YOUNIQUE, LLC

22 Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**DEFENDANT'S NOTICE OF
MOTION AND MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

*[Memorandum of Points and
Authorities and Proposed Order filed
concurrently herewith]*

Hearing:

Date: December 4, 2017

Time: 1:30 p.m.

The Hon. James V. Selna
Santa Ana, Courtroom 10C

Complaint filed: August 14, 2017

Trial Date: None Set

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on December 4, 2017, at 1:30 p.m., or as
 3 soon thereafter as counsel may be heard in Courtroom 10C, in the United States
 4 District Court for the Central District of California, 411 West 4th Street, Room 1053
 5 Santa Ana, California, 92701, the Honorable James V. Selna presiding, Defendant
 6 Younique, LLC, will and hereby does move the Court for an order dismissing the
 7 First Amended Class Action Complaint ("FAC") filed by Plaintiffs Megan Schmitt,
 8 Deana Reilly, Carol Orłowsky, and Stephanie Miller Brun. Defendant brings this
 9 Motion under Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6) on the following grounds.

10 1. Claim 1 (Magnuson-Moss) (FAC, ¶¶ 52-61). Plaintiffs fails to allege
 11 facts to state a claim under Magnuson-Moss. Magnuson-Moss "narrowly defines"
 12 the term "written warranty" as either (a) a written affirmation of fact that "affirms or
 13 promises that such material or workmanship is defect free or will meet a specified
 14 level of performance over a specified period of time"; or (b) a written promise "to
 15 refund, repair, replace, or take other remedial action with respect to such product"
 16 should it not meet specifications. 15 U.S.C. § 2301(6); *Hairston v. South Beach*
 17 *Bev. Co.*, 2012 U.S. Dist. LEXIS 74279, *17-20 (C.D. Cal. May 18, 2012)
 18 (dismissing MMWA claim with prejudice). The Product's label does not promise
 19 that the mascara is "defect free or will meet a specified level of performance over a
 20 specified period of time." (CAC, ¶ 8 (images).) While the Product states that it
 21 contains "natural fibers", this statement is a product description, not a promise that
 22 the product is "defect free" or guaranteeing a level of performance. *See Hairston*,
 23 2012 U.S. Dist. LEXIS at *18-19; *Astiana v. Dreyer's Grand Ice Cream, Inc.*, 2012
 24 U.S. Dist. LEXIS 101371, *9-11 (N.D. Cal. July 20, 2012). Moreover, the Product's
 25 label does not promise to "refund, repair, replace, or take other remedial action" if
 26 the mascara does not meet specifications. (CAC, ¶ 8.) Therefore, it does not meet
 27 the second definition of "written warranty" provided by Magnuson-Moss.

2. Claims 7, 11, 14, 17 (Implied Warranty/Merchantability) (FAC, ¶¶ 105-111; 133-140; 157-164; 184-190, respectively). Plaintiffs fail to allege that the Product is unfit for its ordinary use as a mascara, and thus fail to state a claim for breach of the implied warranty of merchantability. Cal. Com. Code § 2314; Fla. U.C.C. § 672.314; O.R.C. § 1302.27; Tenn. C. § 47-2-314; *see, e.g., Mocek v. Alfa Leisure, Inc.*, 114 Cal.App.4th 402, 406 (2003); *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009) (affirming dismissal of claim; "The plaintiffs admit that the iPod has an 'ordinary purpose of listening to music,' and nothing they allege suggests iPods are unsafe for that use or defective.").

3. Claim 18 (Implied Warranty/Particular Purpose) (FAC, ¶¶ 191-198). Plaintiffs fail to allege a plausible, particular purpose for purchasing or using the Product, and therefore fail to state a claim for breach of the implied warranty of fitness for a particular purpose. Cal. Com. Code § 2315; Fla. U.C.C. § 672.315; O.R.C. § 1302.28; Tenn. C. § 47-2-315; *see also Mathison v. Bumbo*, 2008 U.S. Dist. LEXIS 108511, *27-28 (C.D. Cal. Aug. 18, 2008) (applying California law; dismissing claim for failure to allege a particular purpose; "There is nothing 'peculiar' about using a baby seat to 'secure infants and toddlers.'"); *Foley v. Dayton Bank & Trust*, 696 S.W.2d 356, 359 (Tenn. Ct. App. 1985) (applying Tennessee law; affirming dismissal of complaint; finding that purchasing a truck for the purpose of leasing it for long distance hauling was consistent with the general purpose of purchasing a truck, and therefore plaintiff failed to show a "particular purpose"). Plaintiffs assert that "[t]he particular purpose for which the Products were used was to allow the consumer to avoid *being exposed to synthetic ingredients*." (FAC, ¶ 195 (emphasis added).) This allegation is implausible and cannot be credited: the Product plainly states that it contains nylon in its transplanting gel. (FAC, ¶ 8). Plaintiffs admit that they believe nylon is synthetic (FAC, ¶¶ 26, 30, 34, 38), and Plaintiffs admit that a "reasonable person would not consider nylon 'natural'" (FAC, ¶ 7 (pg. 6)).

1 4. Claim 2 (UCL) (FAC, ¶¶ 62-68). Plaintiffs' UCL claim should be
 2 dismissed with prejudice because only equitable relief is available under the UCL
 3 (*Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003)); the
 4 FAC seeks monetary damages only (FAC, p. 37-38); and Plaintiffs nowhere allege
 5 that their other 17 claims do not accord them an adequate remedy at law (*Munning*
 6 *v. Gap, Inc.*, 238 F.Supp.3d 1195, 1203 (N.D. Cal. 2017) (*citing Rhynes v. Stryker*
 7 *Corp.*, 2011 U.S. Dist. LEXIS 58286, *10 (N.D. Cal. May 31, 2011) ("Where the
 8 claims pleaded by a plaintiff may entitle her to an adequate remedy at law, equitable
 9 relief is unavailable."))). Plaintiffs lack standing to seek equitable relief under the
 10 UCL.

11 5. Claims 15, 16, 17, 18 (Other States' Laws) (FAC, ¶¶ 165-198). Class
 12 action plaintiffs "must allege that they were injured in a particular state in order to
 13 bring claims under that state's laws." *United Food & Commer. Workers Local 1776*
 14 *& Participating Employers Health & Welfare Fund v. Teikoku Pharma USA, Inc.*,
 15 74 F.Supp.3d 1052, 1078-79 (N.D. Cal. 2014) (citing nine other Ninth Circuit
 16 district court cases finding same and based thereon, finding it could address standing
 17 at the motion to dismiss phase; dismissing claims arising under 20 states' laws which
 18 plaintiffs had no connection to). When "a representative plaintiff is lacking for a
 19 particular state, all claims based on that state's laws are subject to dismissal." *In re*
 20 *Flash Memory Antitrust Litig.*, 643 F.Supp.2d 1133, 1164 (N.D. Cal. 2009)
 21 (dismissing claims arising under laws of states for which there was no representative
 22 plaintiff); *accord, Mollicone v. Universal Handicraft, Inc.*, 2017 U.S. Dist. LEXIS
 23 14125, *26-29 (C.D. Cal. Jan. 30, 2017) (finding same and dismissing all claims
 24 arising under other states' laws except for laws of plaintiff's home state and state
 25 where she purchased the product). Plaintiffs purport to bring claims under the laws
 26 of all other states, but lack standing to do so. Plaintiffs are residents of California,
 27 Florida, Ohio, and Tennessee, who have brought claims under the laws of those
 28

1 states. They allege no connection to the laws of the 46 other states to allow them
2 bring claims under those states' laws.

3 6. Claims 6, 8, 18 (Notice Requirements) (FAC, ¶¶ 99-104; 112-118; 191-
4 198, respectively). Plaintiff Reilly alleged breaches of Florida's express warranty
5 law (Claim 6) and of Florida's implied warranty law (Claim 18). To properly plead
6 claims for breach of warranties under Florida law, the complaint must include
7 allegations that the plaintiff provided notice of the breach to the seller. *Dunham-*
8 *Bush, Inc. v. Thermo-Air Service, Inc.*, 351 So. 2d 351, 353 (Fla. Dist. Ct. App.
9 1977) (dismissing complaint for failure to include all required pleading elements,
10 such as notice). Plaintiff Reilly, however, does *not* allege that she gave the
11 statutorily-required notice. This is grounds for dismissal of both claims. *Id.*

12 Plaintiff Brun alleges a violation of Ohio's Consumer Sales Practices Act
13 (O.R.C. § 1345 et seq; "OCSPA"), and seeks to bring a class-wide claim based
14 thereon (Claim 8). Plaintiffs bringing class actions under the OCSPA, however, are
15 subject to the statute's class action notice requirement. *In re Porsche Cars N. Am.,*
16 *Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 880 F.Supp.2d 801, 868 (S.D. Ohio
17 2012) (dismissing claim for failure to meet the notice requirement). Plaintiffs
18 bringing claims on behalf of a class must demonstrate that either (1) the alleged
19 violation is an act that was declared to be deceptive by a rule adopted by the
20 Attorney General before the consumer transaction on which the action is based; or
21 (2) the alleged violation is an act that was determined by a court to violate the
22 OCSPA, and the court's decision was available for inspection before the transaction
23 took place. O.R.C. § 1345.09(B). The class action complaint must identify the rule
24 or case that satisfies Section 1345.09(B)'s notice requirement. *In re Porsche*, 880
25 F.Supp.2d at 868. Plaintiff Brun does not allege that she complied with Section
26 1345.09(B)'s notice requirement or identify the rule or case that was allegedly
27 violated. Accordingly, the claim must be dismissed.

1 Prior to bringing this Motion, counsel for Defendant met and conferred with
2 Plaintiffs' counsel by telephone on October 26, 2017, in compliance with Local Rule
3 7-3. Counsel for Defendant also followed up by detailed email on October 30, 2017.
4 These discussions did not resolve the dispute.

5 This Motion is based on this Notice, the accompanying Memorandum of
6 Points and Authorities, all pleadings, papers and other documentary materials in the
7 Court's file for this action, those matters of which this Court may or must take
8 judicial notice, and such other matters as this Court may consider.

9
10 Dated: November 3, 2017

11 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

12
13 By

/s/ Sascha Henry

SASCHA HENRY

ABBY H. MEYER

Attorneys for Defendant Younique, LLC